APPENDIX

ORDER OF REFERENCE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

February 9, 1965

Before Honorable Elbert P. Tuttle
Honorable Warren L. Jones
Honorable Walter P. Gewin

National Labor Relations Board,
Petitioner,
versus
Skyline Homes, Inc.,
Respondent.
No. 19,352

The National Labor Relations Board having filed its petition praying that Skyline Homes, Inc.. be adjudged in civil contempt of this Court because of its disobedience of this Court's decree entered herein on November 22, 1963; respondent having joined issue; and the Court having found that it is appropriate to designate a Special Master to determine the issues of fact and law raised by the respective pleadings, and at the request of the Court, the Civil Service Commission having certified the names of three competent and qualified Hearing Examiners currently available for appointment, it is

ORDERED that JOSEPH W. KAUFMANN be, and he hereby is, appointed Special Master to take testimony and receive evidence with respect to the issues raised

by the pleadings in this case; that the Clerk shall forthwith furnish the Master with a copy of this order, upon receipt of which the Master shall take an oath, faithfully to perform the duties imposed by this order, and file a copy of such oath with the Clerk of this Court; and it is

FURTHER ORDERED THAT THE MASTER shall have authority, powers and duties, as follows:

(a) To conduct such pre-trial proceedings as may be appropriate to consider the simplification of the issues herein, the possibility of obtaining admissions of facts and of documents; and to conduct or authorize all other matters which may aid in the disposition of the reference, including the entertainment of and disposition of motions for discovery and motions to amend or supplement the pleadings.

(b) With all reasonable diligence, to hold such hearings as may be reasonably necessary to obtain the relevant and admissible oral or documentary evidence from witnesses made available by the parties, or under the compelling process of the Master, at Ocala, Florida, and/or at such other place or places as the Master may deem necessary or advantageous in obtaining said testimony and accommodating witnesses and parties.

(c) To engage a qualified reporter to take and transcribe the testimony adduced at such hearings, each side to pay one-half of the reporter's charges upon the order of the Master.

(d) In accordance with the Federal Rules of Civil Procedure to regulate all proceedings in the hearings before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under this order. He may require the

production before him of admissible evidence upon all matters relevant and material to the issues, including the production of all books, papers, vouchers, documents and writings. Upon request of the parties, he may issue subpoenas for witnesses, who shall be paid witness fees and mileage pursuant to the law applicable to witnesses in the courts of the United States. If, without adequate excuse, a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties and remedies provided therefor. The Master may rule upon the admissibility of evidence, subject to review by this Court upon his report. He may put witnesses on oath and may himself examine them. At the request of either party, he shall make a record of evidence offered and excluded, for review by this Court upon his report.

(e) To conduct the hearings with the design and purpose of keeping the inquiry within reasonable bounds confined to the controlling issues in this case. If an objection to a question propounded to a witness is sustained by the Master, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The Master may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The Master shall take and report the evidence in full, unless it appears that the evidence is not admissible on any ground or that the witness is privileged.

(f) With all reasonable speed after the conclusion of the hearings, to file with the Clerk of the Court the transcript of the proceedings and of the evidence, and the original exhibits, together with the Master's

report thereon and his recommendations as to findings of fact and recommendations as to conclusions of law; a copy of said report and recommendations shall at the same time be served upon the parties. The Master's report and recommended findings and conclusions shall be binding upon this Court only in the manner and to the extent the Court deems appropriate. The Master may require the parties to submit, prior to the filing of his report, proposed findings, objections to proposed findings, and briefs.

(g) The compensation and expenses of the Master are to be paid in the first instance by the Board; but final assessment and allocation of all costs, fees and expenses, including the cost of a reporter, are reserved for further order of the Court.

IT IS HEREBY FURTHER ORDERED that upon the filing with the Clerk of the Court of the Master's report and recommendations, the transcript of the proceedings and the original exhibits, the Clerk shall forthwith mail to all parties notice thereof. Either side may file written objections to the Master's report and recommendations but such objections must be filed with the Court and served upon the other side within twenty (20) days after notice of the report. If only one side files objections to the Master's report, that side shall serve and file its brief in support of its objections within forty-five (45) days after filing of the Master's report. If both sides file objections, then the Board shall serve and file the opening brief within the same period of time. The other side shall file and serve its answering brief within twenty (20) days after filing of the opening brief, and a reply brief may be filed within ten (10) days after filing of the answering brief. The Court will then consider any requests for oral argument.

OPINION OF U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19352

SKYLINE HOMES, INC.,
Petitioner,
versus
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition of the Board to Adjudicate Respondent in Civil Contempt.

(August 11, 1967.)

Before BROWN, Chief Judge, JONES, Circuit Judge and BREWSTER, District Judge.

BROWN, Chief Judge: The National Labor Relations Board petitioned this Court to adjudge Skyline Homes, Inc. in civil contempt because of the alleged disobeyance of a decree entered by this Court on November 22, 1963.[1]

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[1] Skyline Homes, Inc. v. N.L.R.B., 5 Cir. 1963, 323 F2d 642, cert. denied, 1964, 376 U.S. 909, 84 S. Ct. 662, 11 L.ED. 2d 607.

That decree enforced the Board's order requiring Skyline to cease and desist from certain practices and to take affirmative action.[2]

Skyline's defense was that it realized it had to deal with the Union, but as it honestly believed the Union did not represent a majority, it was exercising its legal right to have this fact demonstrated.[3]

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[2] The order required Skyline to:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 2292, as the exclusive representative of all production and maintenance employees of Skyline Homes, Inc. employed at its Ocala plant.

(b) In any other manner interfering with, restraining or coercing such employees in the exercise of their section 7 rights of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the exclusive representative of all of the employees in the appropriate unit and embody in a signed agreement any understanding reached.

(b) Post at its plant in Ocala, Florida, copies of the notice

. . .

[3] The company not only refused to accept an exclusive-representation clause, it refused to acknowledge orally that the union was the exclusive representative. It would only state that it was going to abide by the Court's decree and bargain, but stood by its rights to challenge the union's status by every lawful means, specifically, the appeal from the Regional Board's denial of the company's decertification petition.

The Special Master[4] appointed by this Court to take testimony and receive evidence as to the matter filed a report adverse to Skyline, and Skyline contends that its recommendations are not supported by clear and convincing evidence.

We have carefully considered the evidence which was adduced before the Special Master. It was sufficient to warrant the Special Master concluding that the company in attempting to have the Union decertified as the exclusive representative of the employees shows a lack of good faith. Specifically, the Special Master found that the company acted in bad faith by sending erroneous and misleading letters[5] to the employees as to the relationship between the Union and the employees, by questioning the existence of, and refusing to give expression to, the Union's status as the exclusive bargaining agent, by delaying

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[4] The Board petitioned the Court for an adjudication of contempt on December 2, 1964; on December 21, 1964, the company filed an answer admitting in part and denying in part the allegations contained in the Board's petition. In an order of reference entered on February 9, 1965, the Court appointed Joseph W. Kaufman Special Master to conduct a hearing on the issues raised and to file a report thereon with his recommendations as to findings of fact and conclusions of law.

[5] Skyline's Counsel sent two letters to the employees containing the following:

> "You do not have to belong to any union. If you do not desire to, you do not have to attend the meeting scheduled for Thursday night. If there are a majority of you (as we believe it to be a fact) who do not desire to belong to the union,you will be afforded an opportunity to express your opinion by secret ballot at an election to be held by the National Labor Relations Board."
>
> ". . . what we have told you, in response to your questions, is supported by the National Labor Relations Board."

Of course, Counsel knew that no such election would then be afforded as stated with respect to a certified union. It was also misleading to tell them that "you do not have to have the Union represent you if you do not want to."

the posting of Board notices,[6] and negating the effect of the notices when they were finally posted, and finally by restricting negotiations to "day-to-day" terms and conditions and thereby excluding other non-economic, but mandatory, subjects of bargaining.

The proof was clear and convincing. This activity amounted to interfering with, restraining and coercing employees in contravention of subparagraphs 1 (a) and (b) and 2 (b) of the order of the Board issued November 14, 1961, as enforced and incorporated in the decree of this Court (see note 2 *supra*).

The Court substantially adopts the conclusions and findings of the Master. Accordingly, Skyline is adjudged in civil contempt of this Court. See *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 5 Cir., 1965, 353 F.2d 76.

Such being the case, Skyline must immediately take the following action to purge itself of contempt:

1. Upon request, bargain collectively in good faith with the union as the exclusive representative of its employees in the unit involved in this case and if any understanding is reached, embodying such understanding in a signed agreement; and also desisting immediately from refusing to so bargain in good faith with the union as such representative.[7]

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[6] The company alleges that in moving its plant to Ocala, Florida, the Notices furnished it by the Board were misplaced thus accounting for the late posting of the notices. The Special Master concluded that this allegation was not supported by any evidence, only "hearsay on hearsay."

[7] We decline at this time to sustain the Board's cross assignment concerning Skyline's refusal to bargain about including a recognition clause in the contract. With respect to future bargaining hereby ordered the matter is too uncertain to declare in advance that any particular matter must be discussed or included in any resulting agreement.

2. Immediately post in conspicuous places in its Ocala, Florida plant, including all places where notices to employees are customarily posted, for a period of sixty (60) consecutive days:

   a. the appropriate portions of the notice originally required to be posted by the Court's decree.

   b. an appropriate notice signed by Skyline which states (1) that Skyline has been adjudicated in civil contempt of Court for violating, resisting, disobeying and failing and refusing to comply with the Court's said decree and that Skyline will take the actions in purgation ordered by this Court, (2) that contrary to the impression created by Skyline, an election under Board auspices has not been imminent, and one is not to be anticipated until the Union has had a reasonable time to bargain on behalf of the employees, (3) that the Union is entitled, contrary to Skyline's prior statement, to represent the employees as their exclusive bargaining agent.

3. Maintain such notices in clearly legible condition throughout such posting period and insure that they are not altered, defaced or covered by any other material.

4. File a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Twelfth Region of the Board, and separately notifying said Director of the Twelfth Region in writing within ten (10) days after the entry of the order of adjudication, showing what steps have been taken by Skyline to comply with the Court's directions, and file further until further order of

the court further periodic sworn statements every thirty (30) days, as to Skyline's bargaining with the Union.

All costs of the proceeding are adjudged against the respondent. These shall include the expenditures made by the Board in investigation, preparation, presentation and stenographic reporting of the case, and the expenses (and salary or fee) of the Master, but shall not include salaries of Board counsel or employees.

RESPONDENT'S PETITION FOR REHEARING

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,352

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus
SKYLINE HOMES, INC.,
Respondent.

RESPONDENT'S PETITION FOR REHEARING

Now comes Skyline Homes, Inc., respondent, by Davidow & Davidow, its attorneys, and respectfully petitions this Court for a rehearing of the above case in which the Court

rendered its opinion on August 11, 1967, for the following reasons:

1. The Court ignored the unchallenged reasonable explanation of Respondent's failure to sooner post the notices involved, which was due to the loss of same when Respondent moved its offices.

2. The Court ignored the repeated manifestations of the prejudiced and biased attitude of the Special Master toward the Respondent and its counsel, so that Respondent was denied a fair and impartial hearing.

3. The Court overlooked the perjury of the Union representative concerning the alleged statements of Respondent's counsel, by which perjury the NLRB sought to assert a claim of contempt of this Court's mandate on the part of Respondent.

4. The Court erred in failing to consider the unchallenged efforts of Respondent to negotiate with the Union as manifested by the undisputed testimony and exhibits.

5. The Court's Opinion denies Respondent's right to legally communicate with its employes as guaranteed by the Labor Management Relations Act (Sec. 158(c) Title 29 U.S.C.A.), as well as the First Amendment to the Constitution of the United States.

6. The Court erred in ignoring the unchallenged fact that until the intervention by the representatives of the Regional Office of the National Labor Relations Board, the Union and the Respondent were carrying on negotiations in pursuance of the Order of the National Labor Relations Board and the mandate of this Court.

7. The Court erred in disregarding the unchallenged fact that the Union representatives had been engaged in a series of negotiations with Respondent, which negotiations

only ceased upon the actions of the representative of the Regional Office of the NLRB in directing the procedure as a result of which negotiations were ended by the Union although Respondent urged the continuance of negotiations.

8. The Court erred in ignoring the fact that although not one of its employes was a member of the Union, Respondent did recognize the Union as the sole bargaining agent and did negotiate with the Union as directed by the Court's mandate.

9. The Court erred in ignoring the undisputed fact that at no time did the Union seek to persuade Respondent's employes to join the Union.

10. The Court erred in ignoring the fact that at no time did any of Respondent's employes ever belong to the Union.

11. The Court ignored the fact that one of the purposes of the Labor Management Act (Section 7, Title 1) is that of affording employes the choice of belonging or not belonging to a union.

12. The Court erred in accepting the position of the NLRB in insisting upon form and not substance concerning collective bargaining on the part of Respondent.

13. The Court erred in virtually denying Respondent's right under the express provisions of the Labor Management Act to voice its honest opinion as long as such expression did not involve a "threat of reprisal or force or promise of benefit" to influence the conduct of its employes.

14. The Court ignored the fact that the representatives of the Regional Office of the NLRB had violated the unbroken line of decisions by the United States Courts of Appeal and the Supreme Court of the United States that

the NLRB representatives were not to seek to influence the conduct of union officials in negotiation with management.

15. The Court erred in ignoring the "right to work" protection for employes as guaranteed by Section 12 of the Declaration of Rights of the Constitution of the State of Florida.

16. The Court erred both as to the law and the facts in reference to the letters sent to the employes.

17. The Court erred in attributing any significance to or effect of the letters by Respondent to its employes, because negotiations had been and were continuing even though the letters had been sent.

18. The Court erred in attributing any relationship between the letters and the negotiations with the Union.

19. The Court erred in ignoring and failing to follow its own decisions in comparable matters involving the relationship of employer and union.

20. The Court erred in ignoring the fundamental proposition that the burden of proof is upon the petitioner, the NLRB, and its General Counsel.

21. The Court erred in ignoring the mandatory language of the Labor Management Act which makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer * * *". (Sec. 8(b) (3).).

22. The Court erred in disregarding the fact that the record is completely silent as to any act on the part of Respondent adversely affecting negotiations between the Union and the Respondent.

23. Unless a rehearing is granted, petitioner will suffer great and irreparable injury in that it will be stripped of its rights as provided in the Labor Management Act,

and Constitution of the United States, and encouragement given to representatives of the NLRB to intervene actively on behalf of the Union in negotiations between Respondent and Union, in violation of the rights of the Respondent.

Petitioner respectfully and urgently requests an opportunity for oral argument in support of its petition.

This petition is based upon the files and records of this Court and cause, the record of the hearing before the Special Master, the original Brief of Respondent filed in this contempt proceeding, and the Brief accompanying this Petition for Rehearing.

DAVIDOW & DAVIDOW,

By: .....

Larry S. Davidow

Attorneys for Respondent,

3210 Book Tower,

Detroit, Michigan 48226.

CERTIFICATE OF COUNSEL FOR RESPONDENT

I, the undersigned, Larry S. Davidow, a member of the law firm of Davidow & Davidow, attorneys for the Respondent in the above cause, do hereby certify that I have had personal charge of the above matter, and that the foregoing petition for rehearing is presented in good faith and not for delay, and that I am duly authorized to present said petition on behalf of petitioner.

Larry S. Davidow

Dated at Detroit, Michigan,
this 28th day of August, 1967.